



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS  
WASHINGTON, D.C. 20314-1000

REPLY TO  
ATTENTION OF:

CEPR-P (715)

8 October 2003

MEMORANDUM FOR COMMANDERS/DIRECTORS, ALL USACE COMMANDS

SUBJECT: PARC Instruction Letter 2003-19

1. In accordance with EFARS 1.201-100, this PARC Instruction Letter (PIL) is issued to amend and revise the language for Part 16.504, Indefinite-quantity contracts. Substitute pages are at Enclosure 1, matrix showing change and reason is at Enclosure 2, and the request for this revision from the Savannah District is at Enclosure 3. The team from Savannah District is to be commended for the excellent analysis and recommendation on this issue. Further, all Divisions and Districts should consider Savannah's analysis and format as a model for recommended revisions to the EFARS.

2. Substitute the pages at Enclosure 1 as follows:

Remove page(s)  
16-2 and 16-3

Insert page(s)  
16-2

3. If the subordinate command prefers to rely on a printed EFARS book (as opposed to the electronic EFARS on the PARC homepage), each substituted page is to be stamp dated on the bottom of the page with the corresponding date of this memorandum. Upon completion of the page removals, addressees are to post the PIL with the regulation. Addressees are also to ensure distribution of this PIL to all staff elements as necessary (i.e., engineering, construction, and legal offices).

4. Questions concerning this PIL should be directed to the EFARS Working Group Leader, Wayne Hardin at (202) 761-8647, Email clyde.w.hardin@usace.army.mil.

FOR THE COMMANDER:

3 Encl

ALBERT J. CASTALDO, LTC(P), USA  
Acting Principal Assistant Responsible  
for Contracting

CF: Directors/Chiefs of Contracting

## ENGINEER FAR SUPPLEMENT (EFARS)

### PART 16 — FEDERAL ACQUISITION REGULATIONS SYSTEM

(d) For a multiple award IDC procurement, generally, the maximum amount for each IDC should equal the total anticipated requirements for the procurement in order to allow each awardee fair opportunity to be considered for each task order.

(e) The contract file will be documented prior to release of the solicitation with the appropriate analysis and coordination for the contract decisions mentioned above, in sufficient detail to justify each decision.

**16.504 Indefinite-quantity contracts.** The contracting officer shall establish a minimum quantity for each awardee for all indefinite-quantity contracts to ensure that adequate consideration exists to contractually bind each awardee to participate in the ordering process throughout the term of the contract. Minimum quantities should be equal among all awardees, and shall be determined on a case-by-case basis for each acquisition commensurate with the contract requirements.

#### **16.505 Ordering.**

(b)(1) When two or more IDCs contain the same or overlapping scopes of work so that a particular task order might be issued under more than one of the contracts (including multiple award contracts), the solicitations and the contracts shall state the criteria to be used by the government when selecting the contract that best meets its need. The criteria shall provide a fair opportunity for all awardees to be considered for each order.

(i) Appropriate criteria include performance and quality of deliverables under the current IDCs, an awardee's ability to accomplish the order in the required time, uniquely specialized experience, price (except for A-E services), and other relevant factors.

(ii) Appropriately document the contract file with support for the contracting officer's decision in selecting a particular contractor for task order award.

(5) Each IDC resulting from a multiple award shall include a statement substantially as follows:

“(i) More than one contract is being awarded for the same scope of work as this contract. Each contractor will be afforded a fair opportunity to be considered for each task (or delivery) order in excess of \$2,500, except as provided at FAR 16.505 (b)(2).

(ii) The contracting officer will consider the following factors when awarding a task (or delivery) order: [insert factors such as those listed in FAR 16.505(b)(1) and (b)(1)(i) above].

(iii) If the contractor believes it was not fairly considered for a particular task (or delivery) order, the contractor may present a complaint to the contracting officer. The contractor may appeal the explanation or decision of the contracting officer to the USACE Ombudsman, who is assigned to the USACE Office of the PARC, at the following address: Headquarters, U.S. Army Corps of Engineers, Attention: CEPR-P (USACE Ombudsman), 441 G Street, N.W., Washington, D.C. 20314-1000. The ombudsman will review the contractor's complaint in accordance with FAR 16.505 (b)(5).”

### SUBPART 16.6 — TIME-AND-MATERIALS, LABOR-HOUR, AND LETTER CONTRACTS

#### **16.603 Letter contracts.**

**16.603-3 Limitations.** For application to emergency/disaster situations see EFARS 17.74.

**EFARS WORKING GROUP (EWG)**  
**ACTIONS ON EFARS PART 7 (30Oct 2003)**

<b>Current EFARS</b>	<b>Proposed EFARS</b>	<b>Reason/Comments</b>
<p><b>16.504 Indefinite-quantity contracts.</b></p> <p>(a)(1) The dollar amount for the stated minimum quantity shall be obligated at the time of the award of the base contract (preferably by simultaneous issue of the first order) and at the time of exercising each contract option. Each IDC shall require the Government at a minimum to order supplies or services priced at:</p> <p style="padding-left: 40px;">(i) Two percent of the stated maximum for the base period or \$500,000, whichever is less, and</p> <p style="padding-left: 40px;">(ii) For any option period that is exercised, one percent of the stated maximum or \$250,000, whichever is less.</p> <p style="padding-left: 40px;">(iii) When a maximum amount is specified for the total life of the contract (see 16.501 (S-103) (d)) the minimum amount shall be calculated based on the average amount per period (i.e. maximum amount divided by number of periods). For a multiple award IDC procurement (see 16.501 (S-103) (d)), the minimum amount shall be based on the average amount per period divided by the number of contracts.</p>	<p><b>16.504 Indefinite-quantity contracts.</b> The contracting officer shall establish a minimum quantity for each awardee for all indefinite-quantity contracts to ensure that adequate consideration exists to contractually bind each awardee to participate in the ordering process throughout the term of the contract. Minimum quantities should be equal among all awardees, and shall be determined on a case-by-case basis for each acquisition commensurate with the contract requirements.</p>	<p>To provide USACE contracting officers maximum authority and flexibility to structure acquisitions with appropriate minimum requirements, commensurate with contract requirements. (See analysis, attached to this PIL package, from the USACE Savannah District, dated July 28, 2003, subject: Recommendation to Amend the EFARS at 16.504, Indefinite Delivery Contracts.)</p>

*End 2*



**DEPARTMENT OF THE ARMY**  
SOUTH ATLANTIC DIVISION, CORPS OF ENGINEERS  
ROOM 9M15, 60 FORSYTH ST., S.W.  
ATLANTA, GEORGIA 30303-8801

REPLY TO  
ATTENTION OF  
CESAD-CT

27 August 2003

MEMORANDUM FOR Commander, US Army Corps of Engineers, ATTN: CEPR-P, 441 G Street NW, Washington, DC 20314-1000

SUBJECT: Recommended Revision to EFARS 16.504 (a)(1)(i) & (ii), Indefinite Quantity Contracts

1. Reference CESAS-CT memorandum dated 28 Jul 2003, Subject: Recommendation to Amend the EFARS at 16.504, Indefinite Delivery Contracts.
2. CESAS-CT memorandum is enclosed herewith for your consideration.

FOR THE COMMANDER:

Enclosure

A handwritten signature in black ink, appearing to read "Claudia H. Hundley", is positioned above the printed name.

CLAUDIA H. HUNDLEY  
Acting Director of Contracting  
South Atlantic Division

*End 3*



# DEPARTMENT OF THE ARMY

SAVANNAH DISTRICT, CORPS OF ENGINEERS  
P.O. BOX 889  
SAVANNAH, GEORGIA 31402-0889

REPLY TO  
ATTENTION OF:

CESAS-CT

JUL 28 2003

MEMORANDUM THRU Commander, SAD

FOR: Commander, USACE

SUBJECT: Recommendation to Amend the EFARS at 16.504, Indefinite Delivery Contracts

1. Current status: The subject EFARS subsection establishes a requirement for Corps Districts to obligate a stated minimum quantity at the time of award of the base contract and at the time of exercising each contract option on an IDIQ Contract:

## **16.504 Indefinite-quantity contracts**

(a)(1) The dollar amount for the stated minimum quantity shall be obligated at the time of the award of the base contract (preferably by simultaneous issue of the first order) and at the time of exercising each contract option. Each IDC shall require the Government at a minimum to order supplies or services priced at:

(i) Two percent of the stated maximum for the base period or \$500,000, whichever is less, and

(ii) For any option period that is exercised, one percent of the stated maximum or \$250,000, whichever is less.

2. Background: The language at EFARS 16.504, was added to rectify two perceived deficiencies in the way IDIQ contracts were being awarded and managed in the Corps District offices:

a. Nominal Amount: Prior to the implementation of this requirement, Corps Contracting Offices routinely obligated lesser dollar amounts as a guaranteed minimum for the entire contract period (including options) of an IDIQ contract. The EFARS committee at the time indicated that \$2,500 did not meet the "nominal test" required by the FAR at 16.504(a)(2), which states, "To ensure that the contract is binding, the minimum quantity must be more than a nominal quantity, but it should not exceed the amount that the Government is fairly certain to order." The justification went on to state that the amount of \$2,500 *was not sufficient to cover proposal costs and stand-by costs* that contractors must bear.

## CESAS-CT

SUBJECT: Recommendation to Amend the EFARS at 16.504, Indefinite Delivery Contracts

b. Hollow Contracts: The second stated purpose for raising the minimum guarantee requirement was to *reduce the number of hollow contracts*. "Hollow Contracts" can best be defined using the criteria established in the CCG: "IDCs with less than 33 percent usage."

### 3. Issues:

a. Funding: The current EFARS requirement that the District obligate significant funds from its own or its customer's limited budget in order to award an IDIQ contract creates a significant financial burden. Since the mid-1990s, the DoD, DA and USACE as well as our customers have all encouraged greater use of IDIQ contracts to reduce costs, increase efficiency, and improve responsiveness. Customers often do not have sufficient O&M dollars to obligate 2 percent of the base value of an IDIQ contract due to demands on their funds. The District can obligate the minimum for the base period, but it must use its revolving funds or departmental overhead funds for this purpose.

b. Acquisition Planning: Most if not all Districts annually award a significant percentage (often more than 50 percent) of their work in the final quarter of the fiscal year. This is not due to lack of planning by the District team, but by the flow of funds (particularly O&M) from customers, and the approval process for MILCON projects.

(1) **Delayed Contract Awards**: Due to the lack of available dollars to fund guaranteed minimums of the magnitude mandated in the EFARS, the common practice is to withhold award of an IDIQ contract until a TO(s) of sufficient value to cover the guaranteed minimum is identified and negotiated. This practice can result in delays of several months in executing a contract. These delays have a significant impact on Acquisition Planning within the District, the intent of which is to ensure the District has adequate capability to meet its customers' needs on a continuous basis. Although the District has planned for advertising, negotiating and awarding its IDIQ contracts earlier in the year, if a TO of sufficient value is not available when negotiations are complete, award schedules are affected.

(2) **Exercising Options**: Even when the District is successful in awarding a basic contract according to its Plan, the EFARS requirement for a minimum guarantee on option periods can again impact Acquisition Planning. The District cannot guarantee the flow and timing of work such that a TO of sufficient value will be available at the right time to serve as the minimum guarantee. In some cases this may lead to a decision to exercise an option early (to ensure obligation) when a TO is available even though capacity and time remain in the current ordering period. Otherwise, the District is faced with tapping its own overhead account or requesting funds from the customer (funds the customer may not have within the time the option must be exercised) in order not to lose the opportunity to exercise an option.

c. Opportunity to Compete & Lost Benefit of Competition on MATOCs: As with single IDIQ contracts, funding shortages dictate an approach that leads to award of the basic contracts and obligation of the minimum guarantee as TOs of sufficient value become available. The flow of the work is not within the control of the District so getting all basic contracts awarded under a MATOC can take as much as 6 months. During this time, the competitive benefit of the MATOCs is lost to the Government and the opportunity to compete is restricted until such time as all contractors have received the minimum guarantee on their respective contracts. When it comes time to exercise options on these contracts, under current policy, the Contracting Officer again faces the challenge of finding O&M or revolving funds sufficient to award the minimum guarantee on all contracts, or trying to ensure that enough TOs of sufficient value are available to award along with exercising an option period. There is a risk of course that if funds or TOs are not available the Government could lose the opportunity to exercise the option on one or more contracts thereby reducing the competitive field.

#### 4. Discussion:

a. What is a "nominal" amount and what is the purpose?

The courts have consistently held that the minimum guarantee on an IDIQ contract forms the consideration for the contract to make it binding and that the determination whether a stated minimum quantity is "nominal" must consider the nature of the acquisition as a whole. See Sea-Land Service, Inc., B-278404.2, Feb 9, 1998 98-1 CPD ¶ 47 at 12; and ABF Freight Systems, Inc., et al., B-291185, Nov 8, 2002, 2002 WL 31513386 (Comp. Gen.). In fact, in ABF Freight Systems, Inc. et al., *supra*, the GAO found that "[a] minimum quantity guarantee for each lane, even if it amounts to only a few hundred dollars, is sufficient consideration to form a binding contract." Further, the courts have disallowed the argument by contractors that the minimum guarantee is a form of liquidated damages intended to compensate the contractor for "proposal" and "standby" costs. See AJT & Associates, Inc., ASBCA 50240, 97-1 BCA ¶ 28823, in which the contractor argued that it was entitled to the full amount of the minimum guarantee for the base year (\$15,000) as liquidated damages since it had maintained a fully staffed A-E organization to handle up to the estimated maximum amount of the contract and had incurred "various proposal expenses." In upholding the Contracting Officer's decision to award the contractor \$1,500 as lost profits, the ASBCA stated: "[The contractor] is entitled to be placed in as good a position as it would have been by performance of the contract. On the other hand, [the contractor] is not entitled to be put in a better position than it would have been if it had to perform and bear the expense of full performance...Accordingly, appellant has received all of the compensation to which it is entitled."

b. Is there a statutory or regulatory requirement for a minimum guarantee for option periods?

The FAR at 16.504(a)(4)(ii) requires only that a contract for an indefinite quantity specify the minimum and maximum quantities to be ordered under the *contract* (emphasis added). In Varilease Technology Group, Inc. v. United States, 289 F.3d (Fed. Cir. 2002), 44 GC ¶ 192, the Federal Circuit concluded that the exercise of subsequent options did not give rise to separate requirements contracts and did not give rise to separate IDIQ contracts with separate minimum quantity requirements. Rather, the court turned to the FAR to find that the minimum quantity requirement in the base contract satisfied the Government's requirement for a minimum guarantee even for subsequently exercised option periods.

c. Does the benefit of having contract capacity available to meet mission needs outweigh the risk of "hollow contracts?"

Customer demands for greater flexibility, improved responsiveness and greater surge capacity in the Districts' contracting capabilities have been met largely by the increased use of IDIQ contracts in all mission areas. In recent years the Districts have started turning to MATOCs, which provide the added benefit of competitive pricing. These trends are consistent with DoD, DA and USACE policy to make greater use of these types of contracts to become more responsive to the military and reduce costs. With the increased use of IDIQ contracts by the Districts, the potential for "hollow contracts" has certainly increased. This potential is even greater when considering MATOC contracts, since once the minimum quantities are satisfied, there is no way for the Government to know when or how often a given contractor will be used again under the sealed bidding or best value selections for individual orders. To the extent that the EFARS policy on minimum guarantees was implemented to bring attention to the need to manage contract capacities and reduce the incidence of "hollow contracts", the objective has largely been achieved. Districts are reducing contract values and/or not exercising options where lack of usage indicates that capacity is not required. Districts are also sharing capacity on their IDIQ contracts with other Districts to better serve customers and make the best use of available capacity. To remain competitive with agencies such as GSA and Department of Interior and to provide the level of service demanded by our military and civil customers, the Districts must be allowed to maintain sufficient capacity to meet both known and unanticipated requirements as well as unpredictable surges.

**5. Recommendation: The policy at EFARS Subpart 16.504 should be removed. Contracting Officers should set minimum and maximum values on IDIQ contracts and minimum guarantees for the contract based on guidance at FAR 16.504 and relevant case law.**

Such a change would be consistent with the requirements in other FAR supplements including Army, Air Force, Navy, GSA, DOT and NASA. The policy of "one size fits all" for minimum guarantees negatively impacts the Districts' ability to establish and execute their annual acquisition strategies, places an unnecessary strain on customer or District budgets, and dilutes the competitive value of MATOC contracts. The EFARS requirement for minimum guarantees for options causes further disruption and is not based on any statutory or regulatory requirement.




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Finally, to the extent that Districts maintain unnecessary contract capacity, the CMR indicators provide HQ a means for monitoring so that appropriate action can be taken where justified. Even so, as noted above the measure currently employed may require modification to account for the greater use of MATOCs.

*We need help.*

A handwritten signature in black ink, appearing to read "Roger A. Gerber". The signature is fluid and cursive, with a large, stylized "R" and "G".

ROGER A. GERBER  
COL, EN  
Commanding